Supreme Court, U.S.
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00-869 SEP 21 2000

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In The
Supreme Court of the United States

BETTY WOODS WILSON,
Petitioner,

vs.

MICHAEL W. HALEY, Commissioner,
Alabama Department of Corrections, et al.,
Respondents

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE STATE BREACHED ITS DUTY TO DISCLOSE EXCULPATORY INFORMATION IN WILSON'S CASE.

II. WHETHER THE DISTRICT COURT AND COURT OF APPEALS ERRED BY HOLDING THAT WILSON'S TRIAL COUNSEL COULD HAVE OBTAINED THE PSYCHOLOGIST'S NOTES THROUGH THE EXERCISE OF DUE DILIGENCE.

III. WHETHER THE INFORMATION CONTAINED IN THE PSYCHOLOGIST'S NOTES WAS MATERIAL TO THE OUTCOME OF WILSON'S CASE.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies, pursuant to Rule 14(b), that the following persons and entities haven an interest in this petition:

Kristi Adcock – District Attorney
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Harwell G. Davis, III – Magistrate Judge
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Jimmy Fry – District Attorney
Judge Paul W. Greene – Magistrate Judge
Charles Hooper - Trial/Appellate Attorney
Richard S. Jaffe – Appellate Attorney
Susan Moquin – District Attorney
Sam C. Pointer, Jr. – U.S. District Court Chief Judge
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Watson Jimmerson, P.C. – law firm representing Petitioner
Whatley Drake, LLC – law firm representing Petitioner
Betty Woods Wilson - Petitioner
Dr. Jack Wilson (deceased) – victim
Thomas N. Younger – Trial Judge

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CITATIONS OF OFFICIAL REPORTS OF OPINIONS AND ORDERS IN THIS CASE

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(2) United States District Court's Decision (Not Reported)

Wilson v. Harrelson, et al., No. CV97-P-1481-W (N.D. Ala. August 24, 1998)

(3) United States Court of Appeals for the Eleventh Circuit Decision

Wilson v. Haley, 211 F.3d 598 (11th Cir. 2000)

(4) United States Court of Appeals for the Eleventh Circuit Decision on Rehearing

Wilson v. Haley, 216 F.3d 1094 (11th Cir. 2000)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this petition for the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1254(1). The Eleventh Circuit Court of Appeals had jurisdiction over this matter pursuant to Rule 22, Federal Rules of Appellate Procedure, and 28 U.S.C. §2253(c). In the Eleventh Circuit Court of Appeals, Wilson appealed the denial by the district court of her habeas petition under 28 U.S.C. §2254. On October 11, 1998, Judge Sam Pointer, Jr. issued a Certificate of Appealability.

STATEMENT OF THE CASE AND THE FACTS

Betty Wilson is presently incarcerated after being convicted of capital murder in the Circuit Court of Tuscaloosa County, Alabama, on March 3, 1993. She was sentenced to life imprisonment without the possibility of parole. Following her conviction, Wilson filed a motion for post-conviction relief with the state trial court. That motion was denied. On April 13, 1995, the Alabama Court of Criminal Appeals released an opinion affirming her conviction and the denial of Wilson's motion for post-conviction relief. The Court of Criminal Appeals also denied Wilson's application for rehearing. *Wilson v. State*, 690 So. 2d 449 (Ala. Cr. App. 1995).

Wilson then filed a petition for the writ of certiorari with the Supreme Court of Alabama. That petition was granted. On January 17, 1997, that court released a decision affirming Wilson's conviction, and quashing as improvidently granted its writ issued to review the denial of her motion for post-conviction relief. Justices Maddox and Butts dissented from the opinion. *Ex parte Wilson*, 690 So. 2d 477 (Ala. 1997). (Appendix, document A; hereinafter referred to as *Wilson*) In an eighteen (18) page dissent, Justice Maddox concluded that the denial of the petition for post-conviction relief was error. Id. On March 21, 1997, the state supreme court overruled Wilson's application for rehearing with Justices Maddox, Butts and See dissenting. Id.

On May 14, 1997, Wilson filed a petition for the writ of habeas corpus in the United States District Court. On June 16, 1998, the United States Magistrate Judge issued a report and recommendation recommending the denial of Wilson's petition. (Appendix, document B). On August 24, 1998, United States District Judge Sam Pointer adopted the Magistrate Judge's report and denied Wilson's petition for the writ of habeas corpus. (Appendix, document C). On

October 11, 1998, Judge Pointer issued a certificate of appealability. (Appendix, document D).

On September 23, 1998, Wilson filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit. On March 23, 2000, the Eleventh Circuit affirmed the judgment of the district court. (Appendix, document E). On April 5, 2000, Wilson filed an application for rehearing and suggestion of rehearing *en banc*. On May 19, 2000, the Eleventh Circuit issued an order denying Wilson's application for rehearing. (Appendix, document F).

The primary issue on Wilson's appeal was her claim that the state suppressed exculpatory evidence in violation of *Brady v. Maryland*, 83 S.Ct. 1194 (1963). The facts supporting Wilson's *Brady* claim revolve around pre-trial statements and trial testimony given by James White, who the state alleged was Wilson's accomplice, and who was the person the state alleged had committed the murder giving rise to Wilson's conviction. The importance of White's testimony to the state's case against Wilson cannot be exaggerated. That importance was acknowledged by the state in its plea agreement with White, wherein the state admitted that the "capital murder charge against BETTY WOODS WILSON ... would, of necessity, have to be dismissed in absence of this agreement and the testimony and cooperation of James Dennison White." *Wilson* at 485 (Maddox, J. dissenting).

Pursuant to a request by White's attorney, White was examined by a state-employed psychologist to determine his competency to stand trial. That psychologist, Dr. Lawrence Maier, took notes of his interviews with White and later executed a written report. Those notes were not included in the report but were typed, titled "Additional Information Section," and placed in White's file at the Taylor Hardin Secure Medical Facility, a center operated by the Alabama Department of Mental Health and Mental Retardation, on

August 19, 1992, approximately six months before Wilson's trial. *Wilson* at 480-482.

On July 30, 1992, Wilson filed a "Motion for Discovery of Institutional Records and Files Necessary to a Fair Trial." In that motion Wilson specifically requested (1) "[a]ll records generated or maintained by the Alabama Department of Mental Health and Mental Retardation...pertaining to the...accomplice; (2)"[a]ll records pertaining to [the] accomplice and generated by the Taylor Hardin Secure Medical Facility...;" and (3) "[a]ny and all medical, psychological, psychiatric or mental examinations or evaluations relating to...James Dennison White...that [have been] or will be performed by any state agency." *Wilson* at 479-480. On September 2, 1992, the trial court entered an order requiring the state to "maintain an ongoing 'open file' policy with regard to discovery by the defendant," and to allow Wilson to have full access to all such documents that the state knew to exist, "or which with due diligence could be determined to exist." *Wilson*, Appendix A.

Notwithstanding Wilson's specific request, the notes taken by the state-employed psychologist were not turned over to Wilson or her attorneys, despite the fact that the notes had been filed at Taylor Hardin in August 1992, and remained there, unknown to Wilson or her attorneys, until after her trial and conviction. *Wilson* at 480-482.[1] The psychologist's notes regarding his interviews with White were not only material, but contained evidence that would have been of great benefit to Wilson in preparation for trial. As recognized by Justice Maddox in his dissent, "an important component of the prosecution's case was the

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[1]In addition, the psychologist's formal report, which did not include the notes, was not produced until February 5, 1993, two weeks before the petitioner's trial, and then only after the petitioner filed a "Motion to Expedite." *Wilson* at 482.

establishment of a time line that would prove that...Betty Wilson had the opportunity to participate in the murder of her husband." *Wilson* at 483. Two crucial "facts" alleged by the state in its time line was that the murder occurred at approximately 5:00-5:10 p.m., and that Wilson picked White up from the scene at approximately 5:10 p.m. and dropped him off a few minutes later. *Wilson* at 483-484. That time line evidence was crucial to the state's case because, the state argued, it corroborated White's testimony and established a window of opportunity for Wilson's alleged participation. Id. That alleged window of opportunity existed only from 4:50 p.m. until 5:25 p.m. Those parameters were established by the state's witnesses, who showed that Wilson was miles away from the scene of the murder, and in the company of various individuals, before 4:50 p.m. and after 5:25 p.m. *Wilson* at 483.

In summary, the state's case against Wilson depended on the jury accepting the prosecution's contentions that (1) the murder occurred between 4:50 p.m. and 5:25 p.m.; and (2) Wilson picked White up from the scene of the murder before 5:25 p.m.

The suppressed interview notes show conclusively that the state's time line was fatally flawed, that the murder did not occur until well after 5:25 p.m., and that the state's theory of the petitioner's participation simply could not have occurred. According to the suppressed interview notes, White told the psychologist that he did not commit the murder until some time between 6:00 p.m. and 6:30 p.m. *Wilson* at 483. Wilson could not have been at the scene, nor could she have picked up White at those times. From 5:25 p.m. until 8:00 p.m., Wilson's whereabouts, miles from both White and the scene of the murder, and in the company of more than a dozen people, was firmly established by both the State and defense witnesses. *Wilson* at 483-484.[2]

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[2]Witness Pam Hyde's testimony also demonstrated that the murder did

ARGUMENT AND CITATIONS OF AUTHORITY

A criminal defendant is entitled to any information the state has that is exculpatory or favorable to the defense. *Brady v. Maryland*, 83 S.Ct. 1194, 1196-97 (1963). The prosecution's duty to disclose favorable evidence under *Brady* covers not only exculpatory evidence, but also information that could be used to impeach a government witness. *United States v. Bagley*, 105 S.Ct. 3375, 3380-81 (1985); *Giglio v. United States*, 92 S.Ct. 763, 766 (1972). The state is also obligated in a capital case to provide information that would be mitigating at the penalty phase of trial. *Green v. Georgia*, 442 U.S. 95 (1979).

In addition, pursuant to Rule 16 of the Alabama Rules of Criminal Procedure, the prosecution must disclose all exculpatory information and all statements made by the defendant, codefendants or any accomplices. *Ex parte Motley*, 534 So.2d 564 (Ala. 1988) and *Ex parte Lambert*, 519 So.2d 899 (Ala. 1987). Rule 16 provides, in relevant part, that:

> the prosecutor shall . . . permit the defendant to . . . inspect, and copy or photograph . . . papers [and] documents . . . which are within the possession, custody, or control of the state/municipality and which are material to the preparation of defendant's defense.

Ala. R. Crim. P. 16.1(c) (emphasis added).

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not occur until after the alleged "window of opportunity." Ms. Hyde testified that she received a phone call from Jack Wilson, the victim, between 5:00 and 5:30 p.m., when, according to the State, Wilson had already been murdered. (Record on Appeal, reporter's transcript, p. 1664).

Rule 16 also provides that:

> [u]pon written request of the defendant, the prosecutor shall ... permit the defendant to inspect and to copy any results or reports of physical or mental examinations or scientific tests or experiments, if the examinations, tests, or experiments were made in connection with the particular case, and the results or reports are within the possession, custody, or control of the state/municipality, and their existence is known to the prosecutor.

Ala. R. Crim. P. 16.1(d)(emphasis added). *See also United States v. Kaplan*, 554 F.2d 577, 579-80 (3rd Cir. 1977) ("Where documentary evidence is exculpatory, it may be within both *Brady* and Rule 16, but nonexculpatory records are obtainable in advance of trial only by virtue of Rule 16). Moreover, in capital cases such as Betty Wilson's, broadened discovery is warranted. *Ex parte Monk*, 557 So.2d 832, 836-837 (Ala. 1989).

A *Brady* violation occurs when (1) the prosecution fails to disclose evidence; (2) the evidence is favorable to the accused either because it is exculpatory or because it is impeaching; and (3) prejudice results from the suppression. *Strickler v. Greene*, 119 S.Ct. 1936, 1948 (1999); *Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990). To satisfy the prejudice component, the suppressed evidence must be "material;" that is, there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler* at 1948. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 105 S.Ct. 3375 (1985).

The district court and the court of appeals upheld the Court of Criminal Appeals' holding on the *Brady* issue on

three grounds: (1) the information in Dr. Maier's notes was not material to the outcome of the case; (2) the state had no duty to disclose this information because Dr. Maier was not an agent of the State and the prosecution had no knowledge of it; and (3) Wilson's trial counsel could have obtained the notes from Dr. Maier himself through the exercise of due diligence.

I. THE STATE HAD A DUTY TO DISCLOSE THE EXCULPATORY INFORMATION.

Wilson was charged with capital murder. She faced either the death penalty or life without parole, and she received a sentence of life without parole. Because Wilson's case was capital, the state owed a broad discovery duty.

Dr. Maier, an employee of the Alabama Department of Mental Health and Retardation, was court appointed to perform a mental competency evaluation of James White. He performed the examination, prepared a report, and gave a copy to the trial court, the prosecutor, and White's attorney.

Subsequently, Wilson's attorneys filed pre-trial discovery requests for (1) all records generated or maintained by the Alabama Department of Mental Health and Mental Retardation pertaining to Wilson, a co-defendant, or an accomplice; (2) all such records generated by the Taylor Hardin Secure Medical Facility; and (3) any and all medical, psychological, psychiatric or mental examinations relating to White that had been or would be performed by any state or governmental agency.

First, the state never objected to Wilson's discovery requests. Nor did it claim that it did not have the requested documents or that it did not owe a duty to produce them. In response to Wilson's discovery request and the court's order, the state produced Dr. Maier's report and responded that it had "given everything that was requested." (T. 39). Therefore, the state clearly had a duty to produce the requested documents because Wilson's attorneys requested

all of Dr. Maier's documents, the state did not object, and the trial court ordered the state to produce the documents. The state produced Maier's report, without the exculpatory notes, and then claimed that it had produced everything requested.

Second, as Justice Maddox noted, the state's obligation to provide the defendant with discoverable information is heightened when the defense makes a specific request for it. *United States v. Agurs*, 96 S.Ct. 2392, 2399 (1976). "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." Id. In addition, the failure of the prosecution to turn over specifically requested evidence, to which no objection is filed, could mislead the defendant into believing that the evidence does not exist.

In *Bagley*, the Government suggested that a materiality standard more favorable to the defendant reasonably might be adopted in specific request cases because "an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued." *Bagley* at 3383-84. In response to the Government's argument, this Court stated:

> We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial

> decisions on the basis of this assumption.

Bagley, 105 S.Ct. at 3384. Because Wilson's request was specific, the state had a heightened duty to produce the requested documents. *United States v. Agurs*. It breached that duty.

Third, Dr. Maier was an agent of the state. In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), this Court held that the prosecutor's duty to disclose does not apply only to evidence that he is personally aware of. Instead, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the [state's] behalf in the case . . . ." 115 S.Ct. at 1567. The Court summarized its holding as follows:

> [There is not] any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed. 2d 104 (1972). Since, then, the prosecutor has the means to discharge the [state's] *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the [state's] obligation to ensure fair trials.

Id. at 1568.

Therefore, inherent fairness requires the state to produce evidence that is either actually in its possession or

accessible to it. *Calley v. Callaway*, 519 F.2d 184, 223 (5th Cir. 1975); *United States v. Washington*, 550 F.2d 320, 330 (5th Cir. 1977).

Courts nationwide have held that prosecutors have an affirmative duty to search files maintained by different branches of government "closely aligned with the prosecutor" when there is some reasonable prospect of finding exculpatory evidence. *See United States v. Brooks*, 966 F.2d 1500, 1503 (D.C.Cir. 1992) (duty to investigate based on "close working relationship between police and United States Attorney); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (prosecutor's *Brady* obligation extended to a search for FBI files and National Crime Information Center files); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973) *overruled on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) ("there is no suggestion in *Brady* that different arms of the government, particularly when so closely connected as this one for the purpose of the case, are severable entities; therefore, prosecutor's *Brady* obligation extended to a search for a personnel file of a Post Office employee"). *See also Smith v. Secretary Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) ("the prosecution" extends to law enforcement personnel and other arms of the state involved in investigative aspects); *United States v. Osorio*, 929 F.2d 753, 761 (1st Cir. 1991) ("The prosecutor charged with discovery obligations cannot avoid finding out what 'the government' knows, simply by declining to make reasonable inquiry of those in a position to have relevant knowledge."); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) ("[A] prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."); and *Martinez v. Wainwright*, 621 F.2d 184, 186 (5th Cir. 1980) ("The duty to produce requested evidence falls on the state; there is no suggestion in *Brady* that different 'arms' of the government are severable entities.").

In *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995), the court reversed the appellant's conviction for distributing allegedly dangerous drugs collectively known as GHBs. 57 F.3d at 736-37. In *Wood*, the Food and Drug Administration had in its possession research reports that showed that GHBs were not dangerous. Those reports, had they been disclosed to the defense, would have been exculpatory. Id. at 737-38. As in Wilson's case, the Government argued that the prosecutor was not aware that the reports existed, and thus the Government should be excused for its failure to produce them. Id. at 737. However, the Ninth Circuit rejected the Government's argument:

> For *Brady* purposes, the FDA and the prosecutors were one . . . . The Government cannot with its right hand say it has nothing while its left hand holds what is of value . . . . The Government in the form of the prosecutor cannot tell the Court that there is nothing more to disclose while [a government agency] holds in its files information favorable to the defendant.

Id (emphasis added). The court held that *Brady's* constitutional duty "arose from the unfairness of the Government prosecuting a person while keeping as a secret to itself materials that might exonerate him. It is a duty that assumes that the Government's aim in a criminal trial is not victory but justice." 57 F.3d at 737.

It is clear under the facts and law of this case that the prosecution owed a duty to produce Dr. Maier's notes because he was "closely aligned with the prosecutor" due to his close working relationship with the prosecutor and due to his participation in the evaluation of White. At Wilson's Rule 32 hearing, the parties stipulated that:

> 1. Dr. Lawrence R. Maier was appointed to do a mental competency evaluation of James Dennison White. Dr. Maier is regularly employed on a contract basis by the Alabama Department of Mental Health and Mental Retardation to evaluate all criminal defendants where there is a question as to their mental competency. Dr. Maier is employed to work in the Huntsville, Alabama, area.
>
> * * *
>
> 4. It is the practice of Dr. Maier to cause his notes to be transcribed and typed. Dr. Maier's notes, taken during the interview of James Dennison White, were typed into a three page document entitled "Additional Information Section.' These transcribed notes were sent by Dr. Maier to Taylor Hardin Secure Medical Facility as required of him by the Department of Mental Health and Mental Retardation..."

Wilson at 481.

Dr. Maier was required by the Department of Mental Health and Mental Retardation to transcribe his handwritten notes and to send them to Taylor Hardin to be made part of White's mental competency evaluation. The fact that Dr. Maier was required by a state agency to perform this act strengthens Wilson's argument that the prosecution was under a duty to disclose the notes in this case.

In addition, the prosecution was aware that a competency report had been prepared concerning White and even produced Dr. Maier's report as part of its *Brady* response. A copy of the report was filed with the clerk's office and a copy was given to the prosecutor handling White's case. In *McMillian v. State*, 616 So. 2d 933, 948 (Ala. Cr. App. 1993), this was the basis for the court's

holding that the prosecutor had a duty to produce exculpatory evidence found in such reports.

Moreover, at the time of Wilson's trial and thereafter, Dr. Maier was employed by the state and had an extensive working relationship with prosecutors who used him to rebut competency challenges, *Miranda* challenges, and insanity defense challenges. *See Ex parte Janezic*, 723 So. 2d 725, 727 (Ala. 1997); *Tankersley v. State*, 724 So. 2d 557, 566 (Ala. Cr. App. 1998); *Click v. State*, 695 So. 2d 209, 223 (Ala. Cr. App. 1996); *Smith v. State*, 646 So. 2d 704, 713 (Ala. Cr. App. 1994); and *Abernathy v. State*, 642 So. 2d 519, 521 (Ala. Cr. App. 1994);

In fact, Dr. Maier's relationship with the state was so extensive that he expressed a concern to Wilson's attorneys as to whether or not he could talk to them without the permission of the prosecutor. (Rule 32 hearing, page 60). Dr. Maier finally agreed to talk with Wilson's attorneys but limited the discussion to the report itself. Id.

Therefore, the state owed a duty to disclose the exculpatory information contained in Dr. Maier's notes. It breached that duty.

II. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT WILSON'S TRIAL COUNSEL COULD HAVE OBTAINED THE NOTES THROUGH THE EXERCISE OF DUE DILIGENCE.

The due process clause sets the parameters for *Brady*:

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to

> deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial....

Bagley, 105 S.Ct. 3375, 3380 (1985) (footnotes omitted).

A prosecutor is required to exercise due diligence to discover exculpatory evidence because he is the representative of a "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler v. Greene*, 119 S.Ct. 1936, 1948 (1999). Further, as noted by the Fifth Circuit:

> If disclosure were excused in instances where the prosecution had not sought information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States Government.

United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980). *See also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992), where the court held that the prosecution had violated the principles of *Brady* by failing to search for easily obtainable information. In support of its holding, the court stated "that an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government nondisclosure." *Brooks*, 966 F.2d at 1503.

In cases where courts have shifted the blame to defense counsel for failing to discover *Brady* evidence, defense counsel has usually failed to take any action whatsoever to obtain the material. However, the policy reason for shifting the blame to defense counsel has no

application to the facts of this case. Not only did Wilson's attorneys request and obtain the report, but they also took the extra step of meeting with Dr. Maier to learn whatever they could to properly cross-examine White. When Wilson's attorneys met with Dr. Maier, they discussed the importance of trying to impeach White concerning how and when Dr. Wilson's death allegedly occurred. However, Maier never told Wilson's attorneys about what White told him regarding the sequence of events, nor did Maier disclose that he had notes concerning that sequence of events. Clearly, Wilson's attorneys tried to do everything possible to properly defend their client.

Instead of blaming defense counsel for the state's suppression, the proper focus should be on (1) the policy reasons behind *Brady*; (2) the fact that Wilson's attorneys repeatedly requested all of Dr. Maier's documents, the trial court ordered that they be produced, the state produced the report but not the crucial notes, and then stated that it had provided everything and Wilson's counsel relied on this statement; and (3) the state's obligation to provide the defendant with discoverable information which is heightened when defense counsel makes a specific request for it. *United States v. Agurs*, 96 S.Ct. 2392, 2399 (1976).

Moreover, this Court recently decided a case right on point where it held that defense counsel reasonably relied on the prosecution's open file policy and assertion that the defendant had already received "everything known to the government." *Strickler v. Greene*, 119 S.Ct. 1936, 1949-50 (1999).

III. THE INFORMATION IN DR. MAIER'S NOTES WAS MATERIAL TO THE OUTCOME OF THE CASE.

In *Kyles v. Whitley*, 115 S.Ct. 1555 (1995), this Court held that *Brady's* materiality standard is not a sufficiency-of-the evidence standard. Instead, the proper test

for materiality under *Brady* is whether the suppression of the evidence undermines confidence in the outcome of the trial. 115 S.Ct. at 1566.

The Tenth Circuit has indicated that the test for materiality is a "flexible, sliding scale approach to assessing . . . materiality. . . . [T]he specificity of the request (for production) is inversely related to the prosecution's disclosure obligation. As the specificity of the defendant's request increases, a lesser showing of materiality will suffice to establish a violation. Conversely, as the defendant's request becomes more general or even nonexistent, a greater showing of materiality is required to establish a *Brady* violation." *Smith v. Secretary Dept. of Corrections*, 50 F.3d 801, 827 (10th Cir. 1995).

Moreover, in cases where the prosecution's case depends heavily on the reliability or credibility of a single witness, as did the state's case against Wilson, evidence that would tend to impeach that witness's testimony is material and due process requires its disclosure. *Giglio v. United States*, 92 S.Ct. 763 (1972); *Moore v. Kemp*, 809 F.2d 702, 719 (11th Cir. 1987).

As noted earlier, without White's testimony, the state had no case against Betty Wilson or Peggy Lowe. The state recognized White's importance in its plea agreement with White when it stated that the "capital murder charge against BETTY WOODS WILSON and PEGGY JOY LOWE would, of necessity, have to be dismissed in absence of this agreement and the testimony and cooperation of James Dennison White." *Wilson* at 485.

White's importance to the state's case, and the resulting materiality of the suppressed notes, were accurately described by Justice Maddox in his dissenting opinion:

> [T]here can be little question that Dr. Maier's notes were favorable to the defense. White was the prosecution's star witness; Wilson could not be

> convicted of capital murder without this witness's testimony. The statement by White to Dr. Maier that he committed the crime between 6:00 and 6:30 p.m. is favorable to the defense, because it is undisputed that both Wilson and the prosecution presented evidence of her whereabouts at this time, thus giving her an alibi. In addition, this evidence could have been used by Wilson to impeach White's trial testimony.

Wilson at 492 (emphasis added).

White was the only witness who testified regarding the time and manner of the murder, and was the only witness who claimed to have knowledge that Wilson participated in his criminal acts. White's statement to Dr. Maier regarding when the murder occurred, and when he was allegedly "picked up" by Wilson, differed by one to one and one-half hours from the times given for those same events in the time line relied on by the state. Further, the undisputed evidence placed Wilson in two different locations between 6:00 and 6:30 p.m., both of which were miles away from the scene of the crime. In sum, the suppressed notes contained evidence that demonstrated that Wilson simply could not have participated in the crime.

This Court is urged to consider Justice Maddox's observation that "evidence that not only would corroborate Wilson's evidence that she did not participate in the murder, but also would contradict some of White's trial testimony (which is consistent with White's recantation testimony that Wilson was not guilty) would be relevant and material on the issue of Wilson's guilt." *Wilson* at 485. Because they established that the murder and White's flight from the scene took place at a time when it was impossible for Wilson to have been present, the notes were substantial evidence that Wilson was innocent. Further, the notes would have been

very useful impeachment evidence against White, the state's key witness. As a result, the notes were material, and their absence undermines confidence in the verdict reached in this case.

A case with very similar facts is *Perdomo v. United States*, 929 F.2d 967 (3rd Cir. 1991). In *Perdomo*, the defense made a specific request for any information relating to the criminal background of any of the prosecution's witnesses. Id. at 968. The prosecution incorrectly responded that its key witness, Soto, did not have a criminal record. Id. at 969. The government sought to avoid the consequence of its error by arguing that it could not be responsible for withholding *Brady* information because it had conducted a NCIC check which did not reveal Soto's criminal record. Id. However, the witness's record was contained in the local Virgin Island files which were not recorded in the NCIC database. Id.

The trial court denied the appellant's motion for a new trial and ruled that the jury had an opportunity to evaluate the informant's credibility from other damaging testimony that had been elicited during trial concerning his receipt of Government payments and his prior drug usage. Id. The trial court also found that the government had not suppressed Soto's prior record and that the prosecution's failure to learn of the record could not in any way be determined to be a material suppression of exculpatory evidence. Id. In addition, the trial court charged the Office of the Public Defender with knowledge of Soto's prior criminal record because that office had represented Soto in a prior criminal proceeding. Id.

On appeal, the appellant presented evidence of another case where Soto also acted as a testifying informant. Id. at 972. "In a case arising out of an unrelated incident, but with a factual setting quite similar to the case at hand, Jose Rosario was acquitted of charges arising from another Narcotics Strike Force operation that involved the same Hector Soto." Id. In Rosario's case, the defense had been

provided with Soto's criminal record, and at trial, his attorney was able to use that evidence to impeach Soto's testimony. Id.

The Third Circuit held that the prosecution should have known about the prior arrest and conviction because the information was "readily available" to it. Id. at 970-71. The court noted that by searching only the NCIC database, the prosecutors ignored the very records likely to reveal germane information. Id. at 970-71. The court then went on to hold that the evidence was material and that the appellant was entitled to a new trial. In so holding, the court stated:

> The district court did not apply the correct standard for measuring materiality at the sentencing hearing. The court reasoned that the undisclosed information was not material because the jury had ample opportunity to evaluate Soto's credibility due to other damaging testimony that had been elicited concerning the government payments to Soto and his prior drug usage. Whether the jury has had an opportunity to consider other impeachment evidence is not the correct standard for determining materiality of undisclosed information. It is well-established that "impeachment evidence as well as exculpatory evidence falls within the *Brady* rule." *Bagley*, 105 S.Ct. at 3380 (citing *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 766, 31 L.ED.2d 104 (1972)). "Such evidence is evidence favorable [and material] to the accused so that, if disclosed and used effectively, it may make the difference between conviction

> and acquittal." Id. In addition, a defendant is not required to show that evidence, if disclosed, probably would have resulted in acquittal. The Supreme Court has offered the following explanation:
>
> [I]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice. *Bagley*, 105 S.Ct. at 3883. The question is, therefore, whether the testimony that the defense would have been able to elicit would have been different had counsel known of Soto's criminal record beforehand.

Id. at 972.

As in *Perdomo*, Wilson's conviction was based almost exclusively on the testimony of a key witness. Defense counsel made a specific request for information related to that witness which was not supplied by the prosecution. Wilson was convicted and the suppressed evidence was discovered shortly after her conviction. As in *Perdomo* another trial was held (Peggy Lowe's), except this trial was tried with essentially the same evidence. In *Perdomo*, the cases were unrelated but were based on the testimony of the same witness. In Wilson's case, the cases were both related and based on the testimony of the same witness. As in *Perdomo*, Lowe's attorneys had access to the suppressed evidence, and she was acquitted. *Wilson* at 479 and fn. 11 at 496. Finally, in *Perdomo* the trial court was

ordered to grant a new trial. Wilson's case should have the same result.

The most important fact that the district court and Court of Appeals failed to consider on the issue of materiality is that Peggy Lowe was acquitted. The state conceded in its plea bargain with White that neither Wilson nor Lowe could be convicted without White's testimony. Wilson's attorneys did not have Dr. Maier's notes. As a result of the state's suppression, Wilson was convicted, and she is serving a sentence of life without parole. Lowe had the exculpatory notes. She was acquitted. Why? Because Lowe's attorneys had the exculpatory notes that were not given to Wilson's lawyers.

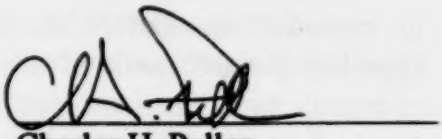
Another important factor that the lower courts failed to consider on materiality is that there are four state appellate judges, each of whom is noted for his judicial restraint, that have substantial questions concerning the *Brady* issue. Judge Patterson believed that the state failed to meets its burden of corroborating White's testimony as required by law. Justices Maddox, See, and Butts of the Supreme Court of Alabama all believed that Wilson has a viable claim of a *Brady* violation. Further, it is clear from Justice Maddox's dissent that materiality should be decided in Wilson's favor. In addition, Judge Pointer took the extremely rare step of granting Wilson a certificate of appealability on the *Brady* issue. It is respectfully submitted that those factors are red flags that should undermine this Court's confidence in the outcome of Wilson's trial.

CONCLUSION

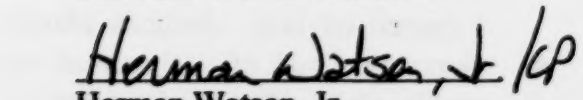
Based upon the facts and case law contained in the foregoing petition, Wilson prays that this Honorable Court will:

1) grant her petition for the writ of certiorari;
2) reverse the decision of the Eleventh Circuit Court of Appeals; and
3) order that court to issue an order to the district court to grant Wilson's petition for the writ of habeas corpus.

Respectfully Submitted,



Charles H. Pullen
State Bar No. 421-92-0390



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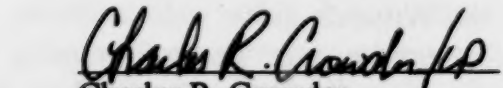

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